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No. 81-1839

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MINNEAPOLIS STAR & TRIBUNE COMPANY,
Appellant,

v.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Minnesota Supreme Court

BRIEF OF KNIGHT-RIDDER NEWSPAPERS, INC., AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

PHILIP A. LACOVARA
(Counsel of Record)
CALVIN J. COLLIER
PETER A. BARNES

HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200

Attorneys for Amicus Curiae
Knight-Ridder Newspapers, Inc.

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Knight-Ridder Newspapers, Inc. ("Knight-Ridder"), as *amicus curiae,* urges the Court to note probable jurisdiction in this appeal from the decision of the Minnesota Supreme Court, 314 N.W.2d 201, 7 Med. L. Rep. 2579 (1981), and either to reverse the judgment summarily or to set the case for full briefing and argument on the merits.[1]

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[1] Although Knight-Ridder, as an *amicus curiae,* is not covered by Rule 28.1 of the Supreme Court Rules, it has a substantial financial stake in the outcome of this case and considers it appropriate to comply with the spirit of the Rule. Knight-Ridder has no parent corporation. Its only non-wholly owned subsidiaries and affiliates are Southeast Paper Manufacturing Co.; TKR Cable Company; Bay Cable, Inc.; Fort Wayne Newspapers, Inc.; Fort Wayne Newspapers (a partnership); Long Beach Cablevision, Co.; and the Seattle Times Co.

INTEREST OF THE AMICUS CURIAE

Knight-Ridder is a nationwide communications company engaged in newspaper publishing, television broadcasting, electronic distribution of news, and related enterprises. It is one of the largest newspaper companies in the United States in terms of total weekly circulation. Newspapers owned by Knight-Ridder have a daily circulation of more than 3.6 million and a Sunday circulation of more than 4.1 million.

Knight-Ridder has a direct financial stake in the outcome of this case. Its wholly owned subsidiary, Northwest Publications, Inc., owns four daily newspapers in Minnesota: the St. Paul Pioneer Press, the St. Paul Dispatch, the Duluth News-Tribune and the Duluth Herald. During the years at issue in this litigation, 1974 and 1975, these four newspapers paid more than $493,000 in use taxes under the Minnesota statute challenged by appellant Minneapolis Star and Tribune Company. (A-5 n.4, A-6 n.5.) These payments were more than one-fourth of the total tax payment collected from all newspapers published in the state. Knight-Ridder currently is paying the use tax under protest, filing protective claims for refunds in the event the statute is declared unconstitutional.

Knight-Ridder's interest in this case, however, like the principles at stake, extends well beyond the contours of a single claim for a tax refund. The Minnesota statute at issue, Minn. Stat. § 297A.14,[2] places substantial financial burdens on a few select newspapers. The statute has the potential to raise large sums for state treasuries, while its scheme of exemptions blunts effective political protests. At least one other state already has adopted a similar statute. *See* Iowa Code Ann. § 423.1(1) (West Supp. 1980). If the Minnesota statute is upheld, it is likely that other states, looking for new sources of substantial revenues, will see a green light to follow Minnesota's lead. As the owner of newspapers in 15 other states, Knight-Ridder has a substantial interest in explaining why the decision below stands as a major threat to freedom of the press and sanctions an impermissible burden on constitutionally protected publications.

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[2] The statute is reprinted in footnote 2 of the Minnesota Supreme Court's decision. *See* A-4.

THE QUESTIONS ARE SUBSTANTIAL

The tax challenged in this case is expressly imposed on the raw materials of newspaper publication: newsprint (paper) and ink used in publishing a periodical. It is, therefore, a direct tax on the exercise of freedom of the press. Moreover, both in intent and in effect, it discriminates among publishers. Major newspapers—defined in terms of their circulation, frequency, and number of pages—are made to bear a tax not borne at all, or at a much lower rate, by (1) smaller newspapers, (2) out-of-state newspapers, and (3) other industrial users of the same materials.

Appellant in its jurisdictional statement has presented a full and well-reasoned discussion of why the challenged statute is unconstitutional and should be struck down by this Court. Knight-Ridder supports the arguments advanced by appellant and will not repeat them here. The purpose of this brief is to stress that the Minnesota Supreme Court applied an erroneous legal standard that utterly fails to comport with the principles set forth by this Court to test the validity of taxes that impinge on First Amendment activity.

I. THE MINNESOTA SUPREME COURT APPLIED AN ERRONEOUS STANDARD OF REVIEW.

The Minnesota Supreme Court spoke twice in its decision of employing a "strict standard" of review (A-8, A-12). It employed no such exacting test, however, for in each paragraph in which the court mentioned a "strict standard," the court also concluded that, under *Madden v. Kentucky*, 309 U.S. 83 (1940), the Minnesota state legislature is entitled to "broad discretion as to classification" of who will be taxed and how much. Deferring to this broad discretion, the court sustained a legislative scheme in which three percent of the state's newspapers bear the entire burden of the use tax on newsprint and ink. In upholding the legislature's skewed classifications, the Minnesota Supreme Court failed to apply the appropriate legal standard.

1. This Court has long recognized that a state's exercise of its taxing power may constitute an impermissible impairment of freedom of speech and freedom of the press. *See, e.g., Murdock v. Pennsylvania,* 319 U.S. 105 (1943); *Grosjean v. American Press Co.,* 297 U.S 233 (1936). Thus, when a state's general taxing program deters free speech, it "must be subjected to close analysis and critical judgment," and "due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall,* 357 U.S. 513, 520, 529 (1958).

This Court's decision in *Madden v. Kentucky, supra,* the sole support cited for the Minnesota court's willingness to defer to the legislature's right to make the classifications at issue, was a pure business case involving taxation of bank deposits. There was no shred of First Amendment activity at stake in *Madden,* and the standard enunciated in that decision is wholly inadequate to gauge the permissibility of a tax that singles out the raw materials of newspaper publication for special burdens. As the Court again admonished just this Term, "regulation of First Amendment rights is *always* subject to exacting judicial review," *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California,* ____ U.S. ____, ____ (No. 80-737) (50 U.S.L.W. 4071, 4072, December 15, 1981) (emphasis added). This exacting scrutiny is no less important where the form of the state regulation is through the taxing system.

2. The Minnesota tax on newsprint and ink is doubly objectionable because its burden falls exclusively and deliberately on large, in-state newspapers. The state's obligation, therefore, was not only to come forward with a "compelling governmental interest" for its tax scheme but also to demonstrate that its classifications are "closely fitted to further that interest." *Larson v. Valente,* ____ U.S. ____, ____ (No. 80-1666) (50 U.S.L.W. 4411, 4416, April 21, 1982). Accordingly, the Minnesota Supreme Court was not permitted to accord the legislature "broad discretion" to impose a discriminatory tax on certain classes of newspapers.

3. The Minnesota court, however, did not subject this tax statute to the constitutionally required tests. The Minnesota tax places a significant financial restraint on a newspaper's First Amendment activities as soon as a newspaper purchases the first dollar of newsprint and ink beyond $100,000 in each year. To support this burden, the state should have been required to come forward and justify why this additional dollar of material suddenly merits taxation. The state also should have been required to explain why it chose a system of taxation that burdens state newspapers but not papers from outside Minnesota, and that burdens newspapers but not manufacturers using the same materials to produce, for instance, sales-tax exempt milk cartons.

The Minnesota Supreme Court should have refused to permit this tax on newspaper publication unless it was satisfied that the state had met its burden. Instead, the court weakly noted that the goal of the statute is to raise revenue and meekly accepted, without further inquiry or analysis, the "suggestion" by the Commissioner of Revenue that the $100,000 exemption might be justified as reflecting "a legislative policy to give favorable tax treatment to smaller enterprises" (A-17). This observation, however, merely begs the constitutional question, because it fails to justify a policy of giving unfavorable tax treatment to larger newspaper enterprises. The Minnesota Supreme Court thus abdicated its constitutional responsibility by indulging in uncritical deference to the legislature's discretion to classify taxpayers into differing categories. The failure to apply a constitutionally sufficient standard of review dooms the court's judgment.

II. THE COURT BELOW DISREGARDED THIS COURT'S PRECEDENTS HOLDING DISCRIMINATORY TAXES UNCONSTITUTIONAL.

1. In *Grosjean v. American Press Co., supra,* this Court struck down as a violation of the First Amendment a license tax on newspapers published in Louisiana. The tax was measured by gross receipts and applied only to 13 newspapers with large circulations. The Minnesota tax, which taxes the raw materials

of newspaper publication in Minnesota, similarly applied only to 11 large newspapers in 1974 and to 13 in 1975. Despite the clear parallels between the cases, the Minnesota Supreme Court sustained the tax here because it is labeled a "use" tax rather than a "license" tax. This facile attempt to limit *Grosjean* disserves the important First Amendment principle for which *Grosjean* stands: taxes aimed unequally at newspapers offend the Constitution. Following this Court's decision in *Grosjean*, other states have declared unconstitutional other varieties of discriminatory taxes levied on publishers. *E.g.*, *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 145 A.2d 111 (1958); *City of Tampa v. Tampa Times Co.*, 153 Fla. 709, 15 So.2d 612 (1943).

The few cases upholding business taxes on newspapers underscore the error committed by the Minnesota Supreme Court. In each of those cases, *see, e.g.*, *Territory of Alaska v. Journal Printing Co.*, 135 F. Supp. 169 (D. Alaska 1955); *Giragi v. Moore*, 49 Ariz. 74, 64 P.2d 819, *appeal dismissed*, 301 U.S. 670 (1937); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947), the newspaper was subject to a tax identical in nature to the taxes imposed on all businesses. Thus, those taxes were neutral in form and in effect. Although the Minnesota Supreme Court blithely described the tax challenged here as part of "a general system of sales and use taxation" (A-12), the fact is that the larger Minnesota newspapers—and only the larger ones—are subject to a specially crafted use tax while the vast majority of goods distributed in the state are subject to a sales tax.

This difference is significant. For instance, out-of-state competitors of Minnesota newspapers are not subject to any tax, yet out-of-state competitors of other businesses in the state face tax burdens equivalent to those of the Minnesota businesses. The use tax hinders any effort by a newspaper to expand its product and give readers additional pages of information at no additional cost. These efforts increase a newspaper's tax burden under the use tax, yet other Minnesota businesses can engage in parallel activity without incurring any additional tax for themselves or their customers. Finally, because the statute provides a unique $100,000 exemption from the use tax on

newsprint and ink, larger newspapers are disadvantaged vis-a-vis their smaller competitors; with a sales tax, there is no similar discrimination against larger businesses.

The characterization of the Minnesota tax as a "use" tax does not shield it from the Court's holding in *Grosjean.* The selective imposition of the Minnesota use tax is at odds with the even-handedness demanded by the First Amendment. The pernicious effect of the Minnesota tax in this case is clear: the exemption mutes the opposition of small, local newspapers, which often exert great pressure on individual legislators, while permitting the legislature to focus its collective animus on the few large, regional newspapers that provide the most penetrating coverage of state affairs. The Minnesota court's failure to recognize the discriminatory effects of the use tax on large Minnesota newspapers is fatal to its conclusion that, despite *Grosjean,* the tax can be sustained as simply a non-discriminatory part of a general business tax program.

2. The court below was similarly disdainful of this Court's decision in *Stewart Dry Goods Co. v. Lewis,* 294 U.S. 550 (1935). In that case, even in the absence of a First Amendment component, the Court held invalid on equal protection grounds a gross-sales tax that imposed higher tax rates on higher volumes of sales. The Minnesota Supreme Court announced that it did "not find the reasoning of *Stewart Dry Goods* .... persuasive" because the Minnesota tax "is not a 'privilege' tax" (A-17). This supposed distinction is weak, since the Minnesota statute explicitly states that the rationale for the tax at issue here is to charge for "the privilege of using, storing or consuming in Minnesota" the newsprint, ink, and other items subject to the tax. *See* A-4 n.2. The Minnesota Supreme Court exceeded its authority in treating *Stewart Dry Goods* as no longer binding on lower courts.

3. The Minnesota Supreme Court erred fundamentally in rejecting appellant's contention that "the legislature may not create a tax exemption which favors publishing enterprises unequally" (A-18). Although the court accurately noted that the facts of *Buckley v. Valeo,* 424 U.S. 1 (1976), were different, it failed to recognize that, under *Buckley* and other First

Amendment decisions of this Court, the state may not consciously favor one group's efforts at protected expression over those of another group. Here, however, the Minnesota legislature has made a conscious, calculated decision that larger newspapers are to be subjected to a tax that smaller newspapers are not to bear. Just as the government may not constitutionally permit only certain categories of people to speak at public meetings, *see City of Madison Joint School District v. Wisconsin Employment Relations Commission,* 429 U.S. 167 (1976), or permit only certain types of organizations to picket, *see Police Department of the City of Chicago v. Mosley,* 408 U.S. 92 (1972), the government may not charge large newspapers a fee for printing that is not likewise borne by smaller newspapers.

On April 21, 1982, the Court struck down a Minnesota statute that favored some religious denominations over others. *Larson v. Valente, supra.* The Court noted that the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." ___ U.S. at ___ (50 U.S.L.W. at 4415). In support of this conclusion, the Court quoted Justice Jackson's statement of the more general principle that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Id.* at ___ (50 U.S.L.W. at 4416), *citing Railway Express Agency v. New York,* 336 U.S. 106, 112 (1949). Under the First Amendment's guarantee of freedom of the press, the same standard must apply to newspapers. In the absence of some compelling state interest and of a program carefully tailored to that interest, the state may not constitutionally prefer one group of newspapers over another.

This case does not involve the validity of a general business regulation, such as a progressive income tax, that incidentally might affect publishers unequally. Even though, under such a system, large newspapers might bear a disproportionately large tax when compared with the tax to be paid by smaller newspapers, the larger papers at least would be treated equally with other corporations of comparable income. A progressive income tax varies neutrally with profits, not size.

By contrast, the tax in question here is not a general business tax; it focuses on the raw materials of publishing newspapers. It contains a unique $100,000 exemption, and thus is based solely on the extent of the publisher's activities. As the court below acknowledged, the $100,000 exemption is designed to favor publishers who use small amounts of newsprint and ink over publishers who use larger amounts. This type of selectivity is not permissible under the First Amendment.

III. THE ISSUE IS IMPORTANT.

So long as the taxing scheme at issue in this case is allowed to continue, some Minnesota newspapers will be subjected to a substantial and continuing burden that is wholly inconsistent with the First Amendment. The sums of money at stake are large and growing larger—the tax rate was raised to five percent effective June 30, 1981—and the vast bulk of this tax is borne by two publishers, the appellant and the *amicus curiae*. Small competitors and out-of-state newspapers face no comparable tax burden.

More importantly, Minnesota's newspaper tax, if left in force, may well be copied by other states that are facing the need to develop new sources of revenue. This tax raises substantial revenue from a small, highly selective group of taxpayers. Iowa has already instituted a similar tax, effective on deliveries of newsprint and ink after January 1, 1980. In addition, for example, the Michigan legislature is actively considering a bill (H.B. 5626) to impose a new tax on newsprint and ink used by publishers as part of an alternative to increasing the state income tax. The decision of the Minnesota Supreme Court, which relies on little more than the state's need to raise money and deference to the state's general authority to classify taxpayers, offends the First Amendment and should not be left to stand as a model for other states.

CONCLUSION

Unless the Court reverses the judgment below summarily, probable jurisdiction should be noted and the case set for full briefing and argument.

Respectfully submitted.

PHILIP A. LACOVARA
(Counsel of Record)
CALVIN J. COLLIER
PETER A. BARNES

HUGHES HUBBARD & REED

Attorneys for Amicus Curiae
Knight-Ridder Newspapers, Inc.

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